

MISSOURI COURT OF APPEALS WESTERN DISTRICT

RICHARD BROWN, et al.,

Respondents,

v.

SUSAN BROWN-THILL,

Appellant.

DOCKET NUMBER WD76778

Date: April 29, 2014

Appeal from:
Jackson County Circuit Court
The Honorable David M. Byrn, Judge

Appellate Judges:
Division Two: Victor C. Howard, P.J., Alok Ahuja and Anthony Rex Gabbert, JJ.

Attorneys:
Joel B. Laner, Kansas City, MO, for appellant.
Catherine R. McLeod and George A. Barton, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

RICHARD BROWN, et al.

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v.

SUSAN BROWN-THILL,

Appellant.

WD76778

Jackson County

Susan Brown-Thill and Richard Brown are the only two children of Eugene D. Brown and Saurine L. Brown, both of whom are deceased. Brown and Brown-Thill received a substantial inheritance from their parents. As a result, Brown and Brown-Thill are jointly involved in the management of a number of trusts and business entities. Brown and Brown-Thill have had ongoing difficulties interacting in connection with financial and business matters. They entered into an Arbitration Agreement in 2010, to facilitate the resolution of their present and future disputes. Under ¶ E of the Agreement, if either party filed suit over an arbitrable dispute, it would be liable to the responding party for the responding party's attorney's fees and costs.

Based on their continuing inability to work together in a productive fashion, Brown-Thill requested that the arbitrator remove Brown as a co-trustee of the Eugene D. Brown Trust. Before the issue could be arbitrated, however, Brown resigned as co-trustee, conditioned on his unilateral appointment of his friend John Rubenstein as his successor. Brown-Thill stated that she wished to arbitrate not only Brown's removal as co-trustee for cause, but also Brown's attempted appointment of Rubenstein as his successor.

Before the arbitration could occur, Brown filed this lawsuit in the circuit court, seeking a declaration that his appointment of Rubenstein as successor co-trustee was valid and effective.

The arbitrator issued a decision finding that Brown's conditional resignation as co-trustee, and his attempt to appoint Rubenstein as his successor, were ineffective. The arbitrator also found that Brown was subject to removal for cause based on his persistent failure to cooperate with Brown-Thill in the administration of the Trust. Brown-Thill filed a federal-court lawsuit to confirm the arbitration award.

In this lawsuit, Brown-Thill filed an answer which included a counterclaim. In the counterclaim, Brown-Thill sought to recover her attorney's fees for defending this action pursuant to ¶ E of the Arbitration Agreement.

The federal court ultimately granted summary judgment to Brown-Thill, and confirmed the arbitration award. The federal court rejected Brown's argument that the issues of his removal for cause, and of his appointment of Rubenstein as his successor, were not arbitrable.

Following the federal court's summary-judgment ruling, the circuit court dismissed all claims in this lawsuit, despite Brown-Thill's request that she be awarded her attorney's fees pursuant to her counterclaim. Brown-Thill appeals.

REVERSED.

Division Two holds:

While a trial court generally has broad discretion whether or not to award attorney's fees, it has no discretion to refuse to award attorney's fees where they are recoverable by contract. Here, ¶ E of the Arbitration Agreement provides in unambiguous language that, if either party pursues any claim subject to the Arbitration Agreement in a forum other than arbitration, the defending party "shall be entitled" to recover its costs, including attorney's fees, associated with the non-arbitral proceeding.

Brown argues that the issue of his removal as co-trustee, and the issue of the validity of his appointment of Rubenstein as his successor, were non-arbitrable, and therefore ¶ E does not apply. Brown raised his arbitrability arguments in the federal court, however, and the federal court rejected those arguments. Brown is bound by the federal court's resolution of those issues, even though an appeal of the federal court's judgment is currently pending. Given that the conditions specified in ¶ E were satisfied, Brown-Thill was entitled to recover her attorney's fees and other litigation costs from Brown, and the circuit court erred in denying her claim.

Before: Division Two: Victor C. Howard, P.J., Alok Ahuja and Anthony Rex Gabbert, JJ.

Opinion by: Alok Ahuja, Judge

April 29, 2014

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